community; seeking any information she could find suggesting that Fletcher may have acted improperly at any time of his career. App. 10a. Indeed, Appointed Counsel did not even stop at Fletcher's professional career. She went to a local bar and asked waitresses about Fletcher's drinking habits. She also investigated Fletcher's personal history, inquiring, for example, whether we might have assaulted two individuals in 1987 – nine years before his admission to the Missouri bar – and whether he might have acted improperly in a child custody dispute he had with the mother of his child years ago. Motion for Order to Show Cause ¶ 293(a) & (b).

After about ten months of investigation, Appointed Counsel filed a 136-page Motion For Order To Show Cause Why Michael Robert Fletcher Should Not Be Disciplined For Professional Misconduct. The Motion contains 307 factual allegations, many of which contain multiple subparts, and 152 counts of alleged misconduct. In addition to addressing the Honeywell complaints, the Motion alleged that Fletcher committed misconduct in various ways in nine other cases in district court over the course of his career – all but one (*Turner*, the original Honeywell case) of which were totally unrelated to the Honeywell complaints. No litigant, attorney, or judge previously had suggested that any of the conduct besides filing the Honeywell complaints might have violated any ethical rule.

3. On October 24, 2003, the district court issued an Order To Show Cause why the allegations "set forth in [Appointed Counsel's] motion" did not warrant disciplinary action. After Fletcher filed a general denial of the allegations against him, Chief Jude Whipple appointed a three-judge panel to hold a hearing regarding the matter. The order stated that the panel – Judges Gaitan, Laughrey, and Dorr – "shall determine issues of fact, consider matters in mitigation, [and] rule on any procedural issues or other matters necessary to make a recommendation to the Court en banc concerning the disposition of this disciplinary matter."

The three-judge panel then announced that it would hold a hearing, which would address "only [factual] allegations 1-183 of the Motion for a Show Cause Order." App. 14a (referencing order). The panel did not dismiss the remaining allegations. Nor did it announce which of the 152 misconduct counts the court would consider.

The three-judge panel told the parties at a scheduling conference that no discovery would be permitted without permission of the court. App. 231. Accordingly, Fletcher soon filed several motions. He requested access to Appointed Counsel's files; the right to serve various interrogatories and requests for admission; the right to show the disciplinary charges to potential witnesses; and the right to depose witnesses disclosed by Appointed Counsel. The three-judge panel denied all of Fletcher's motions, save condoning his access to those documents in Appointed Counsel's files that Appointed Counsel was willing to turn over. Fletcher also requested that Judges Smith and Fenner be recused from the en banc panel because they instigated the disciplinary proceedings. The district court never took any such action.

At the outset of the hearing, Fletcher objected to the expansion of the investigation beyond the Honeywell complaints and asked the court to dismiss the other allegations. The panel denied that request without comment. Fletcher also repeatedly objected to the panel's refusal to specify which of the 152 counts it was considering. The panel rebuffed these objections without comment as well. Following the hearing, it issued a report and recommendation, suggesting that Fletcher be suspended for three years for engaging in various forms of misconduct. App. 14a.

Over two months later, the district court, sitting *en banc*, issued an order adopting as facts the vast majority of Appointed Counsel's allegations and holding that Fletcher had violated the Missouri Rules of Professional Conduct at various

times of his career. 23a-28a. These holdings fall into three basic categories. First, the court ruled that Fletcher made misrepresentations to the court (a) by using deposition quotes "out of context" in the Honeywell complaints and (b) telling a defendant's employee at a deposition in another case that the employee "faced personal liability" when Fletcher had "never named [him] as an individual defendant." App. 24a-25a. Second, the court held that Fletcher engaged in conduct with "no substantial purpose" other than to intimidate and harass third parties when (a) he included the deposition testimony in the Honeywell complaints; (b) he suggested in phone calls and a deposition in another case that a defendant's employee had improperly discussed settlement directly with his client; and (c) conducted abusive depositions in the Honeywell case and in two other cases. App. 25a-26a. Third, the district court ruled that Fletcher engaged in conduct "prejudicial to the administration of justice" when he threatened a party in a case against a hospital that he would "publicly disclose confidential patient information." 26a-27a..

The district court suspended Fletcher from practice before that court for three years, effective immediately. The order provides the Fletcher is "subject to reinstatement only pursuant to Local Rule 83.6(f)," App. 28a, which requires him to petition the court and show "by clear and convincing evidence that [he] has the necessary integrity, moral qualifications, and competency for readmission."

4. The Eighth Circuit affirmed the suspension. As is relevant here, the Eighth Circuit rejected Fletcher's argument that Judge Smith's and Judge Fenner's refusals to recuse themselves required reversal. The Eighth Circuit reasoned that these judges' decision to initiate disciplinary proceedings against Fletcher did not taint those judges' impartiality because it showed merely that they "suspected" him of professional misconduct before the hearings began. App. 18a. The Eighth Circuit further ruled that even if these judges should have

recused themselves, the error was "harmless" because there is no outward evidence that these judges preconceived views affected the district court's ultimate *en banc* decision. App. 18a-19a.

The Eighth Circuit also rejected Fletcher's argument that the Appointed Counsel improperly enlarged her investigation by transforming a particular allegation of misconduct into a dragnet for anything Fletcher had ever done wrong. The Eighth Circuit reasoned that Appointed Counsel's decision to investigate Fletcher's entire legal career was "indispensable" in order to determine "whether Fletcher's conduct during the Honeywell litigation was an isolated violation of the ethical rules." App. 18a.

5. Fletcher filed a timely petition for panel rehearing or rehearing en banc. On November 10, 2005, the Eighth Circuit denied this petition without comment. App. 29a.

6. Shortly thereafter, the Eighth Circuit issued an order suspending Fletcher from practice before it, for a period to run parallel with his suspension from the district court. App. 30a-31a.[1]

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[1] Fletcher hereby challenges this suspension as well, but because it rests entirely on the Eighth Circuit's decision to affirm the district court's suspension, *see* App. 31a, Fletcher will not separately discuss the Eighth Circuit's suspension.

REASONS FOR GRANTING THE WRIT

Two procedural improprieties the Eighth Circuit tolerated below conflict with other courts' jurisprudence and call for this Court's swift intervention.

1. The Eighth Circuit erred in holding that district judges may both initiate disciplinary proceedings – based on a belief that an attorney has committed misconduct warranting discipline – and then determine whether discipline is, in fact, warranted. Elementary notions of due process, as well as the federal recusal statute, dictate that a judge may not be both an accuser and an impartial arbiter. The Eighth Circuit compounded this error by holding that such judges' actions, even if unlawful, were harmless here because a multi-member panel issued a unanimous disciplinary decision. Justices of this Court, as well as numerous lower courts, have recognized that a conflicted judge's participation in a multi-member panel requires reversal regardless of the panel's ultimate vote. Multi-member panels engage in shared enterprise that goes well beyond their ultimate vote, so the presence of a conflicted judge always distorts – or at least presents an unacceptable risk of distorting – the decisionmaking process.

2. The Eight Circuit's decision to condone a new form of attorney-discipline proceeding – a career-spanning investigation and punishment – also warrants review. The purpose of attorney discipline is to deter misconduct and to protect the public. Allowing investigations and sanctions to extend beyond the particular alleged misconduct triggering them serves neither of these objectives. Instead, such procedures pose a serious threat that courts will decide to investigate persons that they dislike – rather than actions that trouble them – and that disciplinary sanctions will become punitive rather than preventative. This Court should act promptly to stamp out the Eighth Circuit's suggestion that attorney discipline may be used in this fashion.

I. The Eighth Circuit's Tolerance For Judges Participating In Formal Disciplinary Matters They Initiated Is Erroneous And Conflicts With Other Courts' Decisions.

The district judges who initiated formal disciplinary proceedings against Fletcher – by accusing him of "misconduct which, if substantiated, would warrant discipline," W.D. Mo. Local Rule 83.6(d)(1) – sat in ultimate judgment of whether he did in fact deserve discipline. Fletcher challenged this participation as violative of due process and the federal recusal statute, 28 U.S.C. § 455. The Eighth Circuit, however, held that (1) district judges who request that their court initiate formal disciplinary proceedings against an attorney need not recuse themselves from such proceedings and (2) even if judges should recuse themselves under these circumstances, their failure to do so is harmless if they are part of a larger panel that acts unanimously. Both of these holdings are incorrect and warrant review.

Due process requires a judge to recuse himself from a proceeding when it "would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear, and true." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (quoting *Ward v. City of Monroeville*, 409 U.S. 57, 60 (1972)); *see also Tumey v. Ohio*, 273 U.S. 510, 523 (1927). And under the federal recusal statute, a judge must recuse himself from "any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). In other words, "[i]f it would appear to a reasonable person" that a judge would have "an interest in the litigation," then he must recuse. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988).

It thus comes as no surprise that in prior cases in which district judges complained to initiate formal disciplinary proceedings against an attorney, those judges recused

themselves. *See, e.g., Landscape Properties, Inc. v. Whisenhunt,* 127 F.3d 678, 682 (8th Cir. 1997) (district judge "referred the case to other district judges . . . to determine whether any disciplinary actions should be taken against Mr. Crockett – a proceeding from which the district judge recused himself"); *Neal v. Wilson,* 112 F.3d 351, 357 (8th Cir. 1997) ("Judge Howard recused himself because the District Court for the Eastern District of Arkansas [his court] had referred Wilson's disciplinary matter to the Arkansas bar authorities."). If a judge feels strongly enough to take the unusual step of requesting that formal disciplinary proceedings be initiated against an attorney, the average person on the street obviously would doubt the impartiality of that judge to decide whether the attorney does, in fact, deserve discipline.

The Eighth Circuit, however, ignored this reality, ruling that the complaining judges' preconceptions here were legitimate under this Court's decision in *Liteky v. United States,* 510 U.S. 540 (1994). *Liteky,* however, dealt with an entirely different issue: the circumstances under which judges must recuse themselves based on "prior rulings" in prior cases. *Id.* at 550. Fletcher sought recusal based on the judges' decision *in this particular matter* to initiate misconduct proceedings.

In this context, the Due Process Clause, as well as the federal recusal statute, prohibit assuming that judges who were part of the "accusatory process" can be neutral as to whether the person they accused is found guilty of the alleged misconduct. *In re Murchison*, 349 U.S. 133, 137 (1955).[2] "While [such judges] would not likely have all the zeal of a prosecutor, it can certainly not be said that [they] would have none of that zeal." *Id.* Accordingly, in the interest of

[2] There is an exception to this rule, of course, for proceedings that may be "summarily" handled, *Murchison,* 349 U.S. at 137, such as Rule 11 sanctions. But the Due Process Clause prohibits disciplinary proceedings from being handled this way. *In re Ruffalo,* 390 U.S. 544, 550-51 (1968).

protecting the impartiality and reputation of the federal judiciary, this Court should grant review to clarify that judges who formally initiate disciplinary proceedings against attorneys must recuse themselves from those ensuing proceedings.

2. The Eighth Circuit's harmless-error determination likewise warrants review. The general rule is that a failure to recuse in response to a timely and valid request requires reversal. *Liljeberg*, 486 U.S. at 861-62 (§ 455 case); *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991) (deprivation of due process right to impartial tribunal is "structural error" that requires reversal). And this Court held in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), that when a conflicted judge, in violation of the Due Process Clause, authors and casts the decisive vote in an appellate court decision, the failure to recuse requires reversal. *Id.* at 827-28.

Three Justices in *Lavoie* concurred separately to say that when conflicted judges on multimember courts violate due process by not recusing from proceedings, it is irrelevant whether their votes were decisive. Justice Blackmun explained for himself and Justice Marshall that a conflicted judge's "mere participation in the shared enterprise of appellate decisionmaking – whether or not he ultimately wrote, or even joined, the [appellate court's] opinion – pose[s] an unacceptable danger of subtly distorting the decisionmaking process." *Id.* at 831 (Blackmun, J. concurring in the judgment). Justice Brennan added:

> The description of an opinion as being "for the court" connotes more than merely that the opinion has been joined by a majority of the participating judges. It reflects the fact that these judges have exchanged ideas and arguments in deciding the case. It reflects the collective process of deliberation which shapes the court's perceptions of which issues must be addressed and, more importantly,

> how they must be addressed. And, while the influence of any single participant can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition. The participation of a judge who has a substantial interest in the outcome of a case of which he knows at the time he participates *necessarily* imports a bias into the deliberative process. This deprives litigants of the assurance if impartiality that is the fundamental requirement of due process.

Id. at 831 (Brennan, J. concurring). Still, the majority opinion insisted it was deciding the case only on its facts, and it expressly reserved the question whether reversal is required when a conflicted judge on a multimember court participates in a proceeding does not cast the "decisive" vote. *Id.* at 827-28 & n.4.

In the years that have followed, federal courts of appeals and state courts of last resort have divided over this issue. Three state supreme courts have held that when, as here, judges who arguably lack impartiality participate in their court's decision making process, the resulting decision must be vacated, regardless of the extent of agreement in the court's ultimate judgment. *See Powell v. Anderson*, 660 N.W.2d 107, 122-23 (Minn. 2003) (reversal required even though opinion had been unanimous); *Johnson v. Sturdivant*, 758 S.W.2d 415, 416 (Ark. 1988) (ordering vacatur because one justice with a conflict had participated in a 6-1 decision); *Nationwide Mut. Ins. Co. v. Clay*, 525 So.2d 1339, 1341 (Ala. 1987) (reversal required even though conflicted judge's vote had not been decisive). Echoing the *Lavoie* concurrences, these courts recognize that the purpose of recusal with respect to multimember tribunals is to prevent judges whose impartiality might reasonably be questioned from participating in a court's *deliberation*, because the views of partial judges may

improperly influence others' votes. Even if other judges (or district courts or law clerks) have given prior nonbinding recommendations in line with the court's ultimate decision, it is impossible to know whether the conflicted judges improperly encouraged others to follow those recommendations or influenced the ultimate decision in some other way.

Here, however, the Eighth Circuit disregarded the *Lavoie* concurrences and held that the conflicted judges here could *not* have "prejudiced the investigatory or adjudicatory process" because the *en banc* court, of which they were a part, ultimately agreed with the smaller hearing panel's recommendations. Slip op. at 18-19. Two state courts of last resort have issued similar decisions. *See State v. Lund*, 718 A.2d 413, 418 (Vt. 1998) (unanimous decision of panel need not be disturbed when one judge is later recused); *Goodheart v. Casey*, 565 A.2d 757, 761-62 (Pa. 1989) (declining to vacate judgment because conflicted judges did not author opinion or provide the decisive votes for result).

This Court should resolve this conflict and make clear that the Eighth Circuit's holding here is wrong. It is wrong as a matter of law, because conflicted judges' participation on multimember courts improperly permeates the entire decisionmaking process, not just the ultimate vote. And it is wrong as a matter of fact, because the conflicted judges here participated not only in assessing the hearing panel's recommendations, but they also apparently consulted with the appointed counsel *during her investigation*. In fact, at oral argument in the Eighth Circuit, appointed counsel referred several times to *ex parte*, off-the-record discussions she had during her investigation with "the two judges who appointed me," presumably being the two complaining judges. See Audio of Oral Arg. at 12:40-13:50, 19:00-19:57, 21:40-22:27, *In re Fletcher*, 424 F.3d 783 (8th Cir. 2005) <http://www.ca8.uscourts.gov/tmp/ 042636.html>. This level of improper involvement surely requires reversal.

II. The Eighth Circuit's Tolerance For A Disciplinary Investigation And Sanction Spanning An Attorney's Entire Career Disserves The Goal Of Attorney Discipline And Upsets Settled Expectations Of Finality.

The district court explained in the letter notifying Fletcher of the proceedings' commencement that "[t]he particular allegations prompting this referral" were whether filing the Honeywell complaints breached the duty of candor or were prejudicial to the administration of justice. Yet the district court also expressly gave the Appointed Counsel authority to investigate and prosecute any "other conduct or allegations that may come to her attention during the course of her investigation." App. 10a. And the district court ultimately sanctioned Fletcher principally for such extra conduct over the course of Fletcher's entire career, the bulk of which was wholly unrelated to the Honeywell complaints. The Eighth Circuit condoned this muckraking investigation and resulting sanction, terming such a scorched-earth approach to attorney discipline "indispensable." App. 18a.

This Court should grant review to make plain that object and policy of attorney discipline – which fall within this Court's inherent supervisory powers, *see, e.g., Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-44 (1991) – require restricting investigations and sanctions to the original allegations of misconduct. Fletcher was sanctioned for violating the Missouri Rules of Professional Conduct, which apply in Missouri's federal and state courts. W.D. Mo. Local Rule 83.5(c). It has long been established in Missouri and elsewhere that "[t]he purpose of discipline is not to punish the attorney, but to protect the public and maintain the integrity of the legal profession." *In re Carey*, 89 S.W.3d 477, 502 (Mo. 2002) (quoting *In re Littleton*, 719 S.W.2d 772, 777 (Mo. 1986)); *see also* ABA Standards For Imposing Lawyer Sanctions, Rule 1.1 (1992) (purpose is to protect public, not to punish); Charles W.

Wolfram, Modern Legal Ethics § 3.1 (1986) (rule that discipline is not designed to punish attorney "has been endlessly repeated by modern courts"). Disciplinary measures, in other words, should not be retributive; they should be tailored to "correct any antisocial tendency on the part of the attorney" and to "deter" future misconduct. *In re Staab*, 785 S.W.2d 551, 554 (Mo. 1990); *accord In re Carey*, 719 S.W.2d 780, 784 (Mo. 1986).

Although this Court has never been required to elucidate the procedural requirements that follow from the deterrent purpose of attorney disciplinary rules, the Ninth Circuit has done so in the context of Rule 11 and other sanctions, which also are designed to deter attorney misconduct. *See* Fed. R. Civ. P. 11, Notes of Advisory Committee to 1993 Amendment ("the purpose of Rule 11 sanctions is to deter" misconduct by offending attorney and other attorneys). In *In re Yagman*, 796 F.2d 1165 (9th Cir. 1986), the district court imposed hefty sanctions on the plaintiff's attorney for "an accumulation of all perceived misconduct, from filing through trial" of a two-year litigation. *Id.* at 1183. The Ninth Circuit held that this sanction "fl[ew] in the face of the primary purpose of sanctions, which is to deter subsequent abuses." *Id.* The court of appeals explained:

> This [deterrent] purpose is not well served by tolerating abuses during the course of an action and then punishing the offender after the trial is at an end. A proper sanction assessed at the time of the transgression will ordinarily have some measure of deterrent effect on subsequent abuses and resultant actions. Such prompt action helps enhance the credibility of the rule and, by deterring abuse, achieve its therapeutic purpose. Moreover, the accumulation procedure used at bar tends to perpetuate the waste and delay which the rules are intended to eliminate. We are convinced that the

> magnitude of the sanctions in this case is directly related to the use of this procedure. Abuses were allowed to pass unchecked and, thus, undeterred, and attorney's fees were allowed to accumulate. As a consequence, we are left faced with an unusually large sanctions amount that will, contrary to the policy, serve absolutely no deterrent value in this case.

Id. (internal quotations and citations omitted). In light of these problems, the court concluded that sanctions for "discovery abuses and other vexatious pre-trial behavior" must "brought to the immediate attention of the offending attorney" and addressed "contemporaneously with the offending misconduct." *Id.* at 1185. Otherwise, no deterrence is achieved and the resulting sanction is invalid. *Id.* Allowing misconduct measures "to take the form of such a generic, all-encompassing, massive, post-trial retribution would send shivers through the bar." *Id.*

Other federal and state courts likewise have emphasized that attorney disciplinary matters must be addressed promptly, not as a belated "accumulation of all perceived misconduct." *See, e.g., Thomas v. Capital Security Servs., Inc.*, 836 F.2d 866, 881 (5th Cir. 1988) (en banc) ("[I]t is precept that sanctions must be imposed in a time frame that has a nexus to the behavior sought to be deterred. . . . Sanctions assessed by courts should not amount to an accumulation of all perceived misconduct, from filing through trial, resulting in a single post-judgment retribution in the form of a massive sanctions award.") (quotation omitted); *Uselman v. Uselman*, 464 N.W.2d 130, 143 (Minn. 1990) (same). This requirement to give attorneys timely notice of suspected misconduct "becomes particularly important when a court imposes sanctions against a litigant on its own initiative." *Thomas*, 836 F.2d at 881. If a court perceives sanctionable conduct, it should act quickly so as to protect the public and to maximize the chances that a

narrowly targeted punishment will be effective and that an attorney is not blindsided by enormous retribution for behavior he might have altered.

Requiring swift and targeted sanctions also comports with traditional limits on the prosecutorial function. Dissenting from this Court's decision upholding the now-defunct federal independent counsel statute, Justice Scalia discussed what Justice Jackson called "the most dangerous power of a prosecutor": "that he will pick people that he thinks he should get, rather than the cases that need to be prosecuted." *Morrison v. Olson*, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting) (quoting Robert Jackson, *The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys* (April 1, 1940)). "In such a case," Justice Jackson explained, "it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of *picking the man* and then searching the law books, or putting investigators to work, to pin some offense on him." *Id.* (emphasis added). At all costs, Justice Scalia concluded, courts should avoid condoning rules that would allow "investigating and perhaps prosecuting *a particular individual*" instead of particular allegations of misconduct. 487 U.S. at 730 (Scalia, J., dissenting) (emphasis added).

We are unaware of any attorney disciplinary proceeding in which these remedial and prosecutorial considerations were so thoroughly disregarded as in Fletcher's proceeding. The Eighth Circuit was unable to point to any similar proceeding either. In *Yagman* and similar cases, trial courts improperly waited until a single trial ended to sanction an attorney for conduct that occurred months before in the same litigation. The proceedings here were many orders of magnitude worse. The district court ordered an investigation of Fletcher's entire career, and the Appointed Counsel contacted people throughout the Kansas City legal community, including every lawyer

Fletcher ever went against in a case. Then, the court sanctioned Fletcher for conduct that occurred months and years before regarding *eight entirely different matters* than the Honeywell complaints – none of which was even active anymore. (Appointed Counsel went so far as to allege misconduct dating back as many as 18 years, long before Fletcher attended law school. Motion for Order to Show Cause ¶ 293(a) & (b).) No judge, attorney, or litigant in any of these different cases had filed any contemporaneous complaints about Fletcher's actions, so he had never had any notice that he might be punished for his conduct there. Indeed, in some instances – such as the Banks deposition in the *Turner* litigation – federal magistrate judges had been present (by telephone) during the relevant exchanges and had done nothing to suggest that Fletcher might have violated any disciplinary rules.

If upholding the entire-litigation sanction in *Yagman* "would [have sent] shivers through the bar," 796 F.2d at 1185, allowing the entire-career investigation and sanction here to stand would trigger outright tremors. As the past president of the Kansas City Metropolitan Bar Association testified in the district court hearing, "I can empathize [with Fletcher] because I don't know how I would stand up" to an investigation into my entire career. Eighth Circuit App. 690-91; *see also Morrison*, 487 U.S. at 732 (Scalia, J., dissenting) ("How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile . . . ."). Indeed, there does not appear to be any reported case in which a court has given a special investigator the authority to mail letters throughout an attorney's community and to explore any and every aspect of his conduct throughout his career in an effort to pin as many charges as possible on him.

To be sure, it may be appropriate in attorney discipline matters – just like in criminal cases – to investigate whether

alleged misconduct was an isolated event or part of a pattern. But such investigation should be limited to informing any decision concerning the proper extent of sanctioning. It should not be used to troll for new, freestanding counts of misconduct that a court might use to punish an attorney whom it has decided it does not like. Nor should such investigation subsume the purpose of discipline: to act quickly to protect the public from particular unethical conduct.

The investigation and sanction here went far beyond anything necessary to "correct any antisocial tendency on the part of the attorney." *Staab*, 785 S.W.2d at 554. Instead of quickly taking any necessary action regarding the Honeywell complaints (or some prior matter if the court had felt it appropriate at the time), the district court and the Eighth Circuit deprived Fletcher of the opportunity to "correct future conduct," *Uselman*, 464 N.W.2d at 143, and went straight to a whopping punishment for actions that occurred years ago. This process violated the purpose attorney discipline; it disserved the bar as well as the public. This Court should act now to prevent it from becoming accepted practice.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 04-2636

In Re: Disciplinary Matter of Michael Robert Fletcher,	*	Appeal from the United States District Court for the Western District of Missouri.
Appellant.	*	

Submitted: April 14, 2005
Filed: September 23, 2005

Before RILEY, FAGG, and GRUENDER, Circuit Judges.

GRUENDER, Circuit Judge.

The United States District Court for the Western District of Missouri ("Western District")[1] suspended Michael Robert Fletcher from the practice of law before that court for three years for numerous violations of the Missouri Rules of Professional Conduct, which apply to practice before the Western District. W.D. Mo. R. 83.5(c)(2). Fletcher appeals, arguing that the Western District erred in expanding the scope of the investigation into his misconduct beyond the facts that

[1] The United States District Court for the Western District of Missouri, sitting en bane.

triggered the disciplinary proceedings, that two district judges should have recused themselves from the proceedings against him, and that the Western District denied Fletcher adequate pre-trial discovery. Fletcher also contends that the Western District erred in some of its findings of misconduct and that the sanctions imposed were too harsh given the circumstances of his case. We affirm.

I. BACKGROUND

Fletcher is an attorney with the firm of Simpson Sanders & Fletcher, L.C. in Kansas City, Missouri. He specializes in the area of employment discrimination. He was admitted to the Missouri bar on October 10, 1996, and to the Western District bar on May 20, 1998. Fletcher has a history of using ethically questionable tactics in litigation. In 2000, Western District Judge Ortrie D. Smith described Fletcher's conduct in depositions as "combative" and "macho posturing," in part because of comments that were "belittling" and "threat-like." *Ross v. Kansas City Power & Light Co.*, 197 F.R.D. 646, 657-58, 660 (W.D. Mo. 2000). Shortly thereafter, Western District Judge Scott O. Wright criticized Fletcher for using "race baiting" tactics in another case. *See* Mark Morris, *Judge Denounces Lawyer's Comments; Police Settlement Split among Family*, KANSAS CITY STAR, Oct. 12, 2000, at B1.

A. Turner Litigation

On August 25, 2000, Fletcher filed a lawsuit for a client, William Turner, in the Western District against Honeywell Federal Manufacturing & Technologies LLC ("Honeywell"). The lawsuit ("Turner litigation") alleged that Honeywell had denied Turner promotions on the basis of race. Early in the Turner litigation, the parties participated in mediation under the Western District's Early Assessment Program. As the mediation session concluded, Fletcher began directing profanities at Jill Marchant, Honeywell's in-house counsel, and Karen Cain and William Martucci, Honeywell's outside

counsel. Among other things, Fletcher accused Marchant of being a "fucking liar." Needless to say, the parties were unable to resolve the case in mediation.

In conjunction with the Turner litigation, Daniel Craig, an associate working for Fletcher, deposed Karen Clegg, former president of Honeywell, on June 11, 2001. Craig asked Clegg whether she had made a comment that "the white man is an endangered species at Honeywell."

Craig: Okay. Do you recall being in a management meeting in approximately early 1999 where you made a comment, in fact, wrote on a board something to the effect that the white man is an endangered species at Honeywell?

Clegg: I don't know when – what year that would have been made. I do recall that we provided diversity training to associates, and the trainers, and I happened to be one of the trainers, set out a chart, I believe it was, of perceptions that people had about each other, perceptions that are typically inaccurate and that may have – I believe that one of the statements on the presentation material that was prepared for the trainers.

Craig: But did you actually say something to that effect?

Clegg: I think it was on the chart and I stated that was a perception. I certainly never presented it as my perception. As I said, it was part of diversity training to understand how people misperceive each other.

Fletcher deposed Jimmie Banks, former Honeywell Manager of Human Resources Services and Diversity, on

June 22, 2001. During the deposition of Banks, Fletcher asked a number of pointed questions about vernacular allegedly used in the African-American community. The following exchange is representative of Fletcher's behavior during the deposition of Banks:

Fletcher: Now do you think if I were to refer to your wife as a nigger bitch that would be highly offensive?

Banks: Yes, sir.

Fletcher: Okay. And why would it be highly offensive?

Banks: Because of the nature of the term.

Fletcher: Okay. Now, tell me why you think the term nigger bitch would be offensive.

Banks: In our culture, bitch is referred to as a female dog. In our culture, the word nigger in certain contexts is an offensive term. And you put those two together and you have very offensive identifiers.

Fletcher: Now tell me a context in which it's okay to refer to an African American as a nigger.

Banks: I don't know of any.

Fletcher: Didn't you just testify, sir, that, quote in certain contexts it's offensive?

Banks: Well, as I see it personally, it's always offensive. In terms of how certain people might use it, it could be a term of affection in our culture.

Fletcher: When you say "our culture," what do you mean?

Banks: In our culture. Black culture.

Fletcher relentlessly pressed this line of questioning until Honeywell's counsel objected. As part of the exchange between attorneys and in the presence of the witness, the plaintiff, the court reporter and others, Fletcher characterized Banks's testimony as follows: "The fact that this man has testified that for 40 years he refers to African Americans as niggers, the fact that this man has testified that for 40 years he found it a compliment to be referred to as nigger is shocking." Fletcher added, "This man, in my opinion, has done nothing but step on the backs of black people at Honeywell so he can get further, he could be further ahead." The tirade concluded with Fletcher calling Banks a "self-hating racist" and comparing him to those "Jews that were willing to turn in other Jews to [the Nazis to] protect themselves."

B. Honeywell Complaints

Fletcher eventually learned of several additional individuals who claimed they also suffered racial discrimination at the hands of Honeywell. Initially, Fletcher sought to join these individuals as additional plaintiffs in the Turner litigation. However, after the district court denied his request, Fletcher filed eighteen separate complaints against Honeywell on behalf of these new plaintiffs (the "Honeywell complaints"). These cases then were assigned to numerous judges in the Western District, except Judge Smith, who had recused himself under 28 U.S.C. § 455 from the one case that was assigned to him.

As in the Turner litigation, neither Clegg nor Banks were named as defendants or accused of any wrongdoing. Nonetheless, each of the eighteen complaints contained inaccurate and misleading allegations purportedly based on the

deposition testimony that Clegg and Banks gave during the Turner litigation. For example, the Honeywell complaints contained the following with regard to Banks:

> b. [Banks testified that r]eferring to an African-American as a **nigger**, "could be a **term of affection** in our culture." p.7;
>
> c. "It can be a **compliment** if I say **you're my nigger**," to an African-American. p.8-9;
>
> d. He himself has several people who compliment him by calling him a nigger. p.9-10;
>
> e. He **enjoys being called a nigger** by these people. p.10-11;
>
> f. It makes him **happy** when these **people call him a nigger**. p.14;
>
> g. Non-African Americans may **call him a nigger** without offending him. p.22;
>
> h. Use of the word **bitch** towards a female can be a **term of endearment** in "our culture." p.23; and,
>
> i. Use of the term **nigger bitch** in reference to an African-American female "may be an acceptable expression that people use." p.24.

Complaint at 5, *Brown v. Honeywell Fed. Mfg. & Techs., LLC*, No. 02-CV-219 (W.D. Mo. Mar. 12, 2002) (emphasis in original).

Absent from Fletcher's selective quotations was much needed context. For example, with respect to subparagraph i, Banks actually gave the following testimony:

> Fletcher: Okay. Now, so if it's okay to refer to African Americans as niggers and okay to

refer to African American females as bitch, why would you be offended if someone referred to your wife or daughter as a nigger bitch?

Banks: I think I've responded to the nature of your question, and what you're doing is tying two things together to try to make it sound like I've said something that I actually haven't said.

Fletcher: Okay. Well, is it okay to refer to your wife or daughter as a nigger bitch?

Banks: I told you the terms are highly offensive, but two people who have a relationship, that may be an acceptable expression that people use.

Fletcher: Okay. Tell me a scenario in which it's acceptable to refer to an African American female as a nigger bitch?

Banks: As far as I am personally concerned, there are none.

As is clear from the transcript, Banks testified that he found the terms "nigger" and "bitch" to be highly offensive and inappropriate.

The Honeywell complaints signed by Fletcher similarly distorted the deposition testimony of Clegg. For example, the complaint stated that: "[Clegg] admits that she told a group of management employees in a meeting at Honeywell that **"the white man is an endangered species at Honeywell."** Complaint at 10, *Brown*, No. 02-CV219 (emphasis in original). However, as is clear from her deposition testimony, Clegg stated this was an example of "how people misperceive each other."

Honeywell moved to strike the portions of the complaints that involved its executives' deposition testimony on the grounds that the allegations were impertinent and scandalous. Judge Gary A. Fenner, the first judge to take up this issue, found that the offending paragraphs were "impertinent, scandalous, and taken out of context so as to be misleading." *Samuel Coleman v. Honeywell Fed. Mfg. & Techs., LLC*, No. 02-CV-362, slip op. at 1 (W.D. Mo. June 18, 2002). One month later, Judge Wright entered a similar order in a Honeywell litigation case before him, finding that "with respect to the deposition testimony, plaintiff's counsel has taken statements out of context and mischaracterized other testimony beyond recognition." *Combs v. Honeywell Fed. Mfg. & Tech., LLC*, No. 02-CV-220, slip op. at 2 (W.D. Mo. July 26, 2002). Both judges ordered the complaints to be amended without the offensive deposition-related allegations. Fletcher amended the two complaints before Judges Fenner and Wright but did not amend the complaints pending before other judges.

In September, Judge Howard F. Sachs granted Honeywell's motion to strike, stating that the offending paragraphs "consist of conclusory allegations, at best, and fraudulent mischaracterizations at worst." *Barbara L. Coleman v. Honeywell Fed. Mfg. & Techs., LLC*, No. 02-CV-361, slip op. at 1 (W.D. Mo. Sept. 5, 2002). One month later, Judge Nanette K. Laughrey granted, without substantive analysis, Honeywell's motion to strike, holding that the issue had been "ably addressed by Judge Fenner and Judge Wright in parallel actions." *Brown v. Honeywell Fed. Mfg. & Techs., LLC*, No. 02-CV-219, slip op. at 4 (W.D. Mo. Oct. 3, 2002).

C. Complaints of Misconduct

Initially, Chief Judge H. Dean Whipple notified Maridee F. Edwards, Chief Disciplinary Counsel for the State of Missouri, that Judges Smith and Fenner had "voiced

complaints about the unprofessional and abusive conduct of Michael R. Fletcher in cases before them." Edwards declined to exercise jurisdiction over the issues involving the Western District, instead leaving the matter to the Western District.

On November 7, 2002, Chief Judge Whipple granted yet another Honeywell motion to strike and ordered Fletcher to show cause why he should not be sanctioned. The order to show cause was based on his finding that "[Fletcher] has shamelessly included scandalous allegations" that were "inaccurate, misleading, and inflammatory." *Smith v. Honeywell Fed. Mfg. & Techs., LLC*, No. 02-CV-234, slip op. at 3. The only reason Chief Judge Whipple could find for the inclusion of these allegations was to "harass and embarrass Honeywell management and to shamelessly publicize this case in the media prior to trial." *Id.* at 6.

> The Court can find no legitimate reason why [Fletcher] would include these allegations in a pleading to this Court. Even if these allegations were true-and the context of the depositions show they are not-these allegations are irrelevant and immaterial to the claims set forth in the lawsuit. Plaintiff claims she was discriminated against by not being promoted, but does not allege that either Banks or Clegg was involved in the advancement decisions relating to her.

Id. at 6.

Although Fletcher filed a brief opposing sanctions and Honeywell filed a brief in support, Chief Judge Whipple made no further ruling on the show cause order. Instead, the Western District sent a letter to Fletcher on January 9, 2003, notifying him that Judges Fenner and Smith had referred allegations of misconduct against Fletcher pursuant to Local Rule 83.6(d). The letter explained that particular allegations prompting an investigation and possible disciplinary proceedings "stem from

your representations to the Court in the Honeywell complaints and comparisons with the actual transcripts of the testimony cited." The letter stated that the Western District had appointed Theresa Levings ("Appointed Counsel") to investigate whether Fletcher had violated Missouri Rule of Professional Conduct (Mo. RPC) 4-3.3 (requiring candor toward the tribunal) or Mo. RPC 4-8.4 (prohibiting conduct that is prejudicial to the administration of justice) when he filed the Honeywell Complaints. The letter also notified Fletcher that Appointed Counsel would investigate "other conduct or allegations that may come to her attention during the course of her investigation."

D. The Investigation

Appointed Counsel deposed Fletcher on May 23, 2003. During the deposition, Fletcher acknowledged four outstanding bar complaints against him. Three of these related to assertions Fletcher allegedly made to class representatives in a suit against Rent-a-Center. The fourth complaint involved allegations of bribery, assault and resisting arrest.

Appointed Counsel also mailed letters throughout the Kansas City legal community in order to ascertain whether Fletcher had acted improperly at other times in his career. Her investigation uncovered numerous other instances of Fletcher's demeaning and abusive behavior while participating in depositions and mediation. For example, during the mediation with St. Joseph Health Center of a case involving race discrimination and wrongful discharge, Fletcher threatened to publicize confidential patient information that his client had illicitly photocopied. In another instance of professional misconduct, Fletcher left threatening phone messages at the home and office of Laura Lesniewski, an architect with Habitat for Humanity. Fletcher promised to seek sanctions and bring a lawsuit for Lesniewski's "improper and unethical negotiations with [Billy Duncan, his] former client." Such threats were

hollow and improper because Fletcher knew that Lesniewski was not an attorney bound by the rules that regulate contact with represented parties.

As a final example, Fletcher employed demeaning and inappropriate tactics during the deposition of Steven J. Cox, former police chief of the Leawood Police Department. After Cox had stated that he believed a prior incident of rape occurred sometime in 1989, 1990 or 1991, Fletcher pursued the following line of questioning:

Fletcher: Okay. So you can recall when you graduated high school, but you can't recall when one of your women employees was raped by another employee?

Cox: That's correct.

Fletcher: All right. Is that because the high school graduation had more significance to you than the rape of Miss Gibbs?

. . .

Cox: I – to – as far as a personal milestone in my life, yes. probably so.

Fletcher: Okay. And that is because your graduation from college had more significance to you than Mrs. Gibbs' rape by an officer?

Cox: No, sir.

Fletcher: Okay. Why don't you recall the date of Miss Gibbs' rape?

Cox: Those are also events that people traditionally associate with a year.

. . .

Fletcher: Also, ironically, you remember the decade you graduated from high school, but you can't remember the decade Miss Gibbs was raped, correct?

Fletcher later shifted gears in the deposition and began to threaten both the deponent and his attorney, Rebecca Yocum.

Fletcher: Does she represent you in your 19 – are you aware, sir, that there's a 1983 cause of action filed against you personally?

Cox: No, sir.

Yocum: First of all, sir, that is a misstatement. There is no such action.

Fletcher: Okay. Are you aware that there's an amended complaint in which you are cited specifically under section 1983 of the Civil Code?

Yocum: And you're misstating the record. There is no amended complaint that has been allowed to be filed.

Fletcher: Did she tell you that? Are you aware of that? You can answer.

Cox: No, sir.

Fletcher: Okay. So are you aware that if she's representing you that you may have personal liability in this matter?

Yocum: Mr. Fletcher, you're misrepresenting the facts. Mr. Cox has not been named as a defendant in this litigation, period. And I

resent the fact that you're misrepresenting things to him.

Fletcher: Sir, have you been advised that there's a lawsuit pending or a proposed amendment to the complaint which would potentially involve you personally in liability?

Cox: No, sir.

Fletcher: Is that a fact that you would have liked to have been advised of?

Yocum: Mr. Fletcher, you're misstating facts to him. Stop it. There is no litigation against Chief Cox – former Chief Cox in this litigation.

Fletcher: I don't know why you are getting upset. I'm simply asking him questions –

Yocum: I am upset because you are lying, sir. You are lying to the man. If there's some litigation pending –

Fletcher: You don't ever – you are – this is the second attack by you people, for you to call me a liar. This is done and we're taking it up with the judge.

Yocum: That's fine, sir. But you've totally misrepresented the facts to this man. There is no litigation personally pending against Chief Cox.

Fletcher: For you to attack – for you to attack a member of this Court and call him a liar just bought you a lawsuit. Let's go.

These and numerous other allegations paint a disturbing picture of an overzealous attorney who frequently resorts to unprofessional tactics in an attempt to harass, humiliate and intimidate deponents and their counsel.

E. Disciplinary Proceedings

On October 17, 2003, Appointed Counsel filed with the Western District a Motion for Order to Show Cause Why Michael Robert Fletcher Should Not Be Disciplined for Professional Misconduct ("motion for order to show cause"). The motion contained 157 counts of misconduct, which stemmed from 307 factual allegations. One week later, Chief Judge Whipple issued an order to show cause, which Fletcher answered on December 29, 2003. Pursuant to W.D. Mo. R. 83.6(d)(4), Chief Judge Whipple assigned the matter for a hearing before Judges Fernando J. Gaitan, Jr., Laughrey and Richard E. Dorr.

The three judge panel convened on March 8, 2003, to hear three days of testimony and arguments. Two months later, the three judge panel issued a Report of Findings and Recommendation ("report and recommendation"). According to the three judge panel, Appointed Counsel proved by clear and convincing evidence 167 of the 183 factual allegations the panel considered.[2] Based on the findings in the report and recommendation, the three-judge panel concluded that Fletcher had violated the Missouri Rules of Professional Conduct and that a three-year suspension was appropriate. On May 18, 2004, the United States District Court for the Western District of Missouri, sitting en banc, issued an order ("the en banc

[2] The panel stated that it chose not to consider factual allegations 184-307 because it concluded "there was sufficient evidence of professional misconduct contained in paragraphs 1-183 of Appointed Counsel's Motion for the court to take the necessary action to preserve the integrity of this court."

order") accepting the three judge panel's factual findings and adopting its recommendation for sanctions.

F. Western District's En Banc Order

The Western District's holdings fall into three basic categories. First, the court ruled that Fletcher made misrepresentations to the court in violation of Mo. RPC 43.3(a)(1) (making a false statement of fact to the tribunal) and 4-8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation); second, that Fletcher engaged in conduct with no substantial purpose other than to intimidate and harass third parties in violation of Mo. RPC 4-4.4 (respecting the rights of third persons); and third, that Fletcher engaged in conduct prejudicial to the administration of justice in violation of Mo. RPC 4-8.4(d). The Western District summarized:

> While each and every action by Mr. Fletcher which has been proven by clear and convincing evidence may not constitute a separate ethical violation, the court is firmly convinced that Mr. Fletcher has engaged in a pattern and practice of unethical conduct and has done so to gain an unfair advantage in litigation and to profit financially. He has also exhibited disregard for the authority of the federal court.

In re Disciplinary Matter of Michael Robert Fletcher, No. 03-272, slip op. at 5-6 (W.D. Mo. May 18, 2004) (en banc). As a mitigating factor, the Western District noted that witnesses testified that Fletcher is a talented attorney who lacks appropriate guidance and training and that he is passionate about his clients' causes and has used some of his own money to pursue those causes. The Western District concluded, however, that "[w]hile Mr. Fletcher may possess some talent as an attorney, neither talent nor causes entitle him to violate the professional codes of conduct." *Id.* at 6.

Accordingly, the en banc district court suspended Fletcher from practice before the Western District for three years, effective immediately. The en banc order provides that Fletcher is subject to reinstatement only pursuant to W.D. Mo. R. 83.6(f), which requires him to petition the court and show by clear and convincing evidence that "[he] has the necessary integrity, moral qualifications, and competency for readmission." Fletcher appeals, arguing that his due process rights were violated because (1) the Western District considered conduct outside of the Honeywell complaints, (2) the judges who initiated the disciplinary proceeding did not recuse themselves from joining the en banc order, (3) Judge Smith did not recuse himself from the en banc order despite his recusal from the litigation that gave rise to the disciplinary action, and (4) limitations on pre-hearing discovery prejudiced Fletcher. Fletcher also contends that (5) the Western District erred in its factual findings and (6) imposed an excessive punishment upon Fletcher.

II. DISCUSSION

A. Due Process

"Courts have long recognized their authority to suspend or disbar attorneys, an inherent power derived from the attorney's role as an officer of the court that granted admission." *In re Hoare*, 155 F.3d 937, 940 (8th Cir. 1998). As such, a court's power to discipline members of its bar is "autonomous." *In re Attorney Discipline Matter*, 98 F.3d 1082, 1087 (8th Cir. 1996) (citing *Theard v. United States*, 354 U.S. 278, 281 (1957)). The exercise of this "autonomous" authority is, however, limited by the constitutional requirements of due process. *See Schware v. Board of Bar Exam. of State of N.M.*, 353 U.S. 232, 238-39 (1957) (noting that a court cannot exclude a person from the practice of law in a manner that contravenes the Due Process Clause of the Fourteenth Amendment). In an attorney disciplinary proceeding, due

process requires, at a minimum, "notice and an opportunity to be heard," *Charges of Unprofessional Conduct against 99-37 v. Stuart*, 249 F.3 d 821, 825 (8th Cir. 2001), and that the district court follow its "procedural rules governing attorney discipline," *In re Bird*, 353 F.3d 636, 638 (8th Cir. 2003).

Rule 83(d)(1) of the Western District's local rules provides that "[w]hen misconduct or allegations of misconduct. . . come[s] to the attention of a Judge of [the] Court, . . . the judge shall refer the matter to counsel for investigation and the prosecution of a formal disciplinary proceeding." W.D. Mo. R. 83.6(d)(1); *see also* W.D. Mo. R. 83.6(h) ("[The] Court shall appoint as counsel one or more members of the Bar of [the] Court to investigate allegations of misconduct or to prosecute disciplinary proceedings under these rules. . ."). If, after investigation and review, the appointed counsel concludes that a formal disciplinary proceeding should not be initiated, she must file a recommendation for disposition with the Western District. W.D. Mo. R. 83.6(d)(2). If, however, the appointed counsel concludes that formal disciplinary proceedings should be initiated, she must "obtain an order of [the] Court upon a showing of probable cause requiring the respondent-attorney to show cause within 30 days. . . why the attorney should not be disciplined." W.D. Mo. R. 83.6(d)(3). A respondent-attorney is entitled to a hearing "if any issue of fact is raised [in the respondent-attorney's answer to the order to show cause] or the respondent-attorney wishes to be heard in mitigation." W.D. Mo. R. 83.6(d)(4). Where "the disciplinary proceeding is predicated upon the complaint of a judge of [the] Court, the hearing shall be conducted before a panel of three other judges of [the] Court appointed by the Chief Judge." *Id.*

The Western District and Appointed Counsel assiduously complied with the procedures established in the Western District's local rules. Judges Smith and Fenner complained of Fletcher's improper litigation tactics to Chief Judge Whipple.

Chief Judge Whipple then appointed counsel pursuant to the procedures established in W.D. Mo. R. 83.6(h). After conducting an exhaustive investigation of Fletcher's misconduct, Appointed Counsel initiated formal disciplinary proceedings by filing a 136-page motion for order to show cause, which also served to notify Fletcher of specific factual allegations and formal charges of misconduct. Fletcher responded to the charges, and the matter was set for hearing before a three judge panel that properly did not include either of the complaining judges. The three judge panel heard testimony from witnesses for both Appointed Counsel and Fletcher. The three-judge panel then filed a report and recommendation, which was adopted in full by the en banc court.

1. Scope of the Investigation

First, Fletcher argues the scope of Appointed Counsel's investigation should have been limited to "'allegations of misconduct' that came 'to the attention of a Judge of th[at] Court' prior to the appointment." Appellant's Opening Brief at 16, No. 04-2636 (8th Cir. 2005) (quoting W.D. Mo. R. 83.6(d)(1) & (h)). To the contrary, there is simply no language in Western District's local rules that limits the scope of an appointed counsel's investigation to allegations of misconduct known to the court "prior to the appointment." Appointed Counsel's search for information from those in the Kansas City legal community regarding other instances of Fletcher's professional misconduct was not only consistent with the terms of her appointment, but was indispensable in determining whether Fletcher's conduct during the Honeywell litigation was an isolated violation of the ethical rules. Indeed, the Western District even informed Fletcher of Appointed Counsel's investigation. *See In re Flanagan*, 690 A.2d 865, 873 (Conn. 1997) (noting that, during the investigatory phase, the Due Process Clause does not require notice of the sanctionable charges). Appointed Counsel also informed

Fletcher of new allegations as they were discovered during the course of her investigation.

2. Recusal of Judges Smith and Fenner

Second, Fletcher argues that the failure of the complaining judges, Judges Smith and Fenner, to recuse themselves from the en bane order violated his due process rights. We disagree. Local Rule 83.6(d)(4) requires only that the disciplinary hearing be conducted before a panel of three judges of the Western District, none of whom referred a predicate complaint. Neither Judge Smith nor Judge Fenner participated in the three judge panel that heard testimony, found Fletcher guilty of professional misconduct and recommended sanctions.

There is nothing to suggest that the participation of the complaining judges in the subsequent en banc order was improper. The Western District's local rules do not limit a complaining judge's role in a disciplinary matter after the three judge panel makes its findings and recommendation. In general, doubt as to the impartiality of a judge arises where "the judge [has] demonstrated bias or personal prejudice to the parties." *A.JJ by L.B. v. Kierst*, 56 F.3d 849, 862 (8th Cir. 1995). A judge's opinion of an attorney is wrongful or inappropriate where "it is undeserved, or ... rests upon knowledge that the subject ought not to possess ... or because it is excessive in degree." *Liteky v. United States*, 510 U.S. 540, 550 (1994). At most, Fletcher can show only that Judges Smith and Fenner suspected him of professional misconduct as a result of his conduct in matters before the Western District. No evidence suggests that Judges Smith and Fenner formed opinions of Fletcher that were undeserved, based on improper knowledge or excessive in degree.

Even if we were to hold that Judges Smith and Fenner should have recused themselves from the en bane order, we would find the error to be harmless. *See Bird*, 353 F.3d at 638

(applying harmless error analysis to district courts' failure to follow precisely their procedural rules governing attorney discipline). The en bane court unanimously accepted the three judge panel's factual findings and adopted the recommended sanctions. Because the en bane order did not amend the findings or recommendations made by the three judge panel, Fletcher cannot demonstrate that Judge Smith's and Judge Fenner's participation in the en banc order prejudiced the investigatory or adjudicatory process.

3. Recusal of Judge Smith

Fletcher also argues that because Judge Smith recused himself from the Honeywell litigation, Judge Smith was prohibited from participating in the decision to initiate disciplinary proceedings. Again, we disagree. We do not know why Judge Smith recused himself from the Honeywell litigation, and we are not inclined to accept Fletcher's invitation to speculate. Second, Fletcher has failed to demonstrate how Judge Smith's concern over Fletcher's professional misconduct was tainted by his decision to recuse himself from the Honeywell litigation. Indeed, we believe that professional misconduct should be a matter of concern not only for the judges of the Western District, but for all those admitted to practice before the court. Regardless, the Honeywell litigation and Fletcher's disciplinary proceedings are distinct matters presenting different considerations for recusal. We also note Judge Smith's concern over Fletcher's behavior as an attorney was apparent as early as the Ross case in 2000. *See Ross*, 197 F.R.D. at 657-58, 660. Finally, as discussed above, we do not agree that Fletcher suffered any bias or prejudice from Judge Smith's participation in the decision to initiate an investigation or in the en banc order.

4. Pre-Hearing Discovery

Finally, Fletcher argues that the limitations on pre-hearing discovery placed on him by the three judge panel

violated the Due Process Clause. Once again, we disagree. The motion for order to show cause included a clear enumeration of the charges against Fletcher and a thorough explanation of the bases for those charges. As a result, Fletcher was on notice of the charges against him prior to the disciplinary hearing. Prior to the hearing, the three judge panel gave Fletcher the opportunity to engage in reasonable discovery. Fletcher, however, made vague and unnecessary requests for discovery, such as requests to depose Judges Smith and Fenner, Appointed Counsel and Maridee Edwards, which the three judge panel denied. During the hearing, Fletcher was able to cross-examine witnesses and call witnesses of his own. After reviewing the transcript of the disciplinary hearing, we are confident that the Western District afforded Fletcher every protection of the Due Process Clause when it gave him notice of the charges of misconduct, an opportunity to engage in discovery and a hearing on the charges against him. *See Stuart*, 249 F.3d at 825 (finding no due process violation in the denial of a discovery request because "[a]ttorney discipline procedures require notice and an opportunity to be heard, but they do not require all the constitutional protections provided in criminal prosecutions").

B. Western District's Factual Findings and Conclusions

Fletcher also challenges the Western District's substantive findings of misconduct. We review the district court's disciplinary order for abuse of discretion. *In re Hoare*, 155 F.3d at 940. After carefully reviewing the record on appeal, we conclude that there is sufficient evidence to support the Western District's multiple findings of professional misconduct by Fletcher. In particular, we agree that by selectively quoting deposition testimony in a way that grossly mischaracterized deponents' statements, Fletcher went beyond zealous representation into deceptive and misleading practices. Accordingly, we affirm.

C. Sanctions

Finally, Fletcher challenges the length of his three-year suspension from practice before the Western District. The district court, like a state's highest court, is given "considerable leeway in meting out the sanctions imposed." *In re Hoare*, 155 F.3d at 941 (quotation omitted). We review the terms of a disciplinary order for abuse of discretion. *In re Olkon*, 795 F.2d 1379, 1384 (8th Cir. 1986). Given the pervasiveness of the misconduct and Fletcher's refusal to accept responsibility for his actions, we are convinced that the Western District did not abuse its discretion in imposing the three-year suspension.

III. CONCLUSION

For the reasons discussed above, we affirm the Western District's en banc order suspending Fletcher from the practice of law before that court for three years.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

In re Disciplinary Matter of
Michael Robert Fletcher **No. 03-272D**

ORDER

Findings of Fact

The Court, having received and reviewed the Report of Findings and Recommendations of the panel of Judges who conducted a hearing in this matter pursuant to this Court's order dated January 15, 2004, and having considered thee record as a whole does hereby make the following findings of fact as to the allegations contained in paragraphs 1-183 of Appointed Counsel's Motion For Order To Show Why Michael Robert Fletcher Should Not Be Disciplined For Professional Misconduct:

Appointed Counsel has established by clear and convincing evidence the allegations contained in paragraphs 1-183 of her Motion for Order to Show Cause, except for allegations 68 (there was no proof that Fletcher knew Mr. Craig's state of mind), 73 (there was insufficient proof that Mr. Donelon said that the quotes should never have been in the complaints), 74 (Mr. Craig told Mr. Donelon that Mr. Fletcher wanted to fight the Motion to Strike but Mr. Craig did not independently decide to oppose the Motion to Strike), 98-106 (there is insufficient proof that Mr. Fletcher misrepresented a statement by Mr. Eddy concerning the use of racial epithets in the workplace), 134-137 (these allegations were dismissed during the hearing by Appointed Counsel).

The remaining allegations of misconduct contained in paragraphs 184-307 of Appointed Counsel's Motion have not been considered by this court as it was the court's conclusion

that there was sufficient evidence of professional misconduct contained in paragraphs 1-183 of Appointed Counsel's Motion for the court to take the necessary action to preserve the integrity of this court. The fact that these additional allegations have not been considered by this court is not meant to be an indication that there are no additional matters of professional misconduct contained therein that would be of interest to the Office of Chief Disciplinary Counsel for the State of Missouri.

Violations of the Rules of Professional Conduct

Based upon these findings of fact, the court unanimously concludes that Mr. Fletcher has violated several of the Mo. Rules of Professional Conduct which have been adopted as the standard for this court pursuant to Local Rule 83.5(c)2 and are set forth more particularly below:

A. False Statements and Misrepresentations

First, Mr. Fletcher misrepresented the deposition testimony of Jimmy Banks, Sandra Patterson and Karen Clegg in the *Honeywell* complaints. Mr. Fletcher directed Mr. Craig to prepare the *Honeywell* complaints using deposition quotations taken out of context and then authorized the complaints to be filed using Mr. Fletcher's name. While the *Honeywell* complaints accurately quoted portions of the Banks, Patterson and Clegg depositions, Mr. Fletcher's failure to include related parts of the deposition effectively changed the meaning of the witness's testimony. By directing the preparation and filing of these complaints, Mr. Fletcher mislead the Court and the public concerning both the meaning and significance of the deposition testimony quoted in the complaints.

The court concludes that the filing of the *Honeywell* complaints violated Mo. Rules of Professional Conduct R. 4-3.3(a)(1), which provides that a lawyer shall not knowingly make a false statement of material fact or law to a

tribunal. By quoting the Banks and Patterson deposition testimony out of context, Mr. Fletcher effectively made a misstatement of a material fact given the egregious distortion. The court also concludes that the filing of the *Honeywell* complaints violated Mo. Rules of Professional Conduct R. 4-8.4(c), which provides that a lawyer should not engage in conduct involving misrepresentation.

Mr. Fletcher also violated Mo. Rules of Professional Conduct R. 4-8.4(c) when he told Stephen J. Cox in his deposition that Cox faced personal liability in the *Metzger v. Leawood* case. At the time, Mr. Fletcher knew that he had never named Mr. Cox as an individual defendant in the Metzger case. This misrepresentation was made solely to intimidate Mr. Cox.

B. Intimidation and Harassment

Mr. Fletcher has also violated Mo. Rules of Professional Conduct R. 4-4.4, which provides that "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third party or use methods of obtaining evidence that violate the legal rights of such a person." He violated this provision by misrepresenting the quotations contained in Mr. Banks's, Ms. Cleggs's and Ms. Patterson's depositions.

He also violated this provision in the *Filbern v. Habitat for Humanity* case when he contacted Ms. Lesniewski and told her that she and her employer were going to be sued for tortiously interfering with Mr. Fletcher's contract to represent a client who was suing Habitat for Humanity. He also told Ms. Lesniewski that she had "violated every ethics law pertaining to a client." Ms. Lesniewski was a board member for Habitat for Humanity, was not an attorney and was not prohibited from talking to an employee of Habitat for Humanity who also was a friend. The firm she worked for, BNIM, had no relation to the *Habitat* case. As a result of

Mr. Fletcher's unfounded and repeated threats, Ms. Lesniewski and BNIM had to retain counsel to defend themselves. Mr. Fletcher's actions had no substantial purpose other than to embarrass, burden, intimidate and abuse Ms. Lesniewski and BNIM. Mr. Fletcher then exacerbated the problem by asking Ms. Lesniewski questions during her deposition in the *Filbern v. Habitat for Humanity* case to obtain information that could only be relevant to the threatened lawsuit for tortuous interference, an issue entirely unrelated to the *Filbern* litigation. The court concludes that his purpose in that deposition was to embarrass and intimidate Ms. Lesniewski, rather than to obtain information that was relevant to the *Filbern v. Habitat for Humanity* case.

Fletcher's violation of Mo. Rules of Professional Conduct R. 4-4.4 is further established by his conduct m the *Tanyi* depositions, the *Honeywell* depositions and the *Metzger v. Leawood* depositions. In them, Mr. Fletcher repeatedly used intimidation and harassment for no purpose other than to embarrass or burden a third party.

C. Administration of Justice

Of overarching concern to the court is Mr. Fletcher's violation of Mo. Rules of Professional Conduct R. 4-8.4(d), which provides that a lawyer should not "engage in conduct that is prejudicial to the administration of justice." The facts established at the hearing demonstrate by clear and convincing evidence that Mr. Fletcher's abusive deposition and pleading practices and his willingness to play fast and loose with the facts in depositions and complaints is prejudicial to the administration of justice. Of particular concern is Mr. Fletcher's threat in the *Tanyi v. St. Joseph Health Center* case to publicly disclose confidential patient information. According to the testimony of James Holland, attorney for St. Joseph Health Center, Mr. Fletcher threatened to publicly disclose patient records which Mr. Fletcher's client had taken

from her employer when she was terminated. These records were required by law to be confidential and not disclosed. However, Mr. Fletcher threatened to disclose the confidential information in an amended complaint and then indicated that if the settlement dollars went up, he would not publicly disclose the information. While Mr. Fletcher never did file an amended complaint containing the confidential information, the use of such threats is clearly prejudicial to the administration of justice.

While each and every action by Mr. Fletcher which has been proven by clear and convincing evidence may not constitute a separate ethical violation, the court is firmly. convinced that Mr. Fletcher has engaged in a pattern and practice of unethical conduct and he has done so to gain an unfair advantage in litigation and to profit financially. He has also exhibited disregard for the authority of the federal courts. All lawyers suffer when this conduct occurs because the public measures the credibility and conduct of the profession by the actions of its individual members.

Mitigation

The court has considered the matters in mitigation presented by Mr. Fletcher at his hearing before the panel.

The panel heard testimony from witnesses who believe Mr. Fletcher is a talented attorney who has not had appropriate guidance and training. The panel heard that Mr. Fletcher is passionate about his client's causes and has invested his own funds to pursue those causes. The court makes no finding regarding Mr. Fletcher's skills as an attorney. While Mr. Fletcher may possess some talent as an attorney, neither talent nor causes entitle him to violate the professional codes of conduct. It is particularly troubling to the court that Mr. Fletcher has shown no remorse for his conduct and, in fact, continues to deny that he has done anything wrong. His conduct during his disciplinary hearing suggests that some

form of counseling might benefit Mr. Fletcher. That is a factor the court has considered in mitigation of his behavior.

Disciplinary Action

Having unanimously concluded that Mr. Fletcher is in violation of Mo. Rules of Professional Conduct 4-3.3(a)(1), 4-.4(c), 4-4.4, and 4-8.4(d), and having considered issues in mitigation, the Court concludes that Mr. Fletcher shall be suspended from practice before this Court for a period of three years. He will be subject to reinstatement only pursuant to Local Rule 83.6(f). This Order shall be maintained under seal and shall not be a public record, however, the Chief Judge shall prepare an Order of Public Discipline to reflect this decision.

/s/
DEAN WHIPPLE, CHIEF JUDGE
UNITED STATES DISTRICT COURT

Dated: May 18, 2004

APPENDIX C

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 04-9013

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In re Michael R. Fletcher *

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ORDER ON ATTORNEY DISCIPLINE

Before RILEY, FAGG, and GRUENDER, Circuit Judges.

On July 9, 2004, the court entered an order directing Mr. Michael Robert Fletcher to show cause why his membership in the court's bar should not be suspended as a result of a suspension order issued by the United States District Court for the Western District of Missouri. Fletcher responded to the court's order asking that any disciplinary action be held in abeyance pending his appeal of the district court's order in No. 04-2636, In Re: Disciplinary Matter of Michael Robert Fletcher. Upon consideration of the response, the court entered an order on August 23, 2004, holding the matter in abeyance and submitted the matter to the panel assigned to hear the appeal.

On September 23, 2005, the panel of this court affirmed the Western District of Missouri's suspension order. Fletcher

sought rehearing and rehearing en banc, and those petitions for rehearing were denied on November 10, 2005.

The panel has now considered the matter, and it is hereby ordered that Michael Robert Fletcher is suspended from the practice of law in this court for a period of time coextensive with his suspension in the United States District Court for the Western District of Missouri. This suspension is effective immediately.

November 16, 2005

Order Entered at the Direction of the Court

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 04-2636

In Re: Disciplinary Matter of Michael Robert Fletcher,	*	Order Denying Petition for Rehearing and for Rehearing En Banc
Appellant.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

November 10, 2005

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit